DATUK SAMY VELLU

v.

KARPAL SINGH

HIGH COURT MALAYA, KUALA LUMPUR
LIM BENG CHOON J
[CIVIL SUIT NO. P823 OF 1982]
19 JULY 1989

CIVIL PROCEDURE: *Dismissal of action for want of prosecution - Whether six years delay is inordinate and inexcusable - Whether defendant is prejudiced.*

This is an application by the defendant to dismiss the action for want of prosecution pursuant to O. 34 r. 2 of the Rules of the High Court 1980.

The plaintiff's claim is for damages for libel and slander said to have been contained in a publication printed and published by the defendant and read out by him to a group of persons on 25 October 1982. A statement of claim was issued on 1 November 1982. The defendant filed a memorandum of appearance on 14 November 1982. On 16 November 1982 the plaintiff filed a statement of claim and the defence on 30 November 1982. Summons for directions was filed on 17 January 1983. The inspection of documents was supposed to have been carried out on 25 March 1983.

The solicitors for the plaintiff wrote to the defendant's firm asking for a postponement of the inspection to which the defendant's firm agreed. Nothing further was done in the action and on 9 February 1989 the defendant applied to dismiss the action for want of prosecution.

Held:

[1] The delay of over six years is inordinate or excessive and inexcusable. In deciding whether an action should be dismissed for want of prosecution, the Court will look at the conduct of both parties. The agreement made on 25 March 1983 between the defendant and the plaintiff is not one that imposed "a duty on each party to take reasonable steps to get the action ready for hearing" much less "to restore the case for trial when both parties are ready to proceed." The agreement was made merely to accommodate the request made by the plaintiff's solicitors to postpone the inspection of documents until the return of his Counsel from England. It cannot be construed as an unconditional approval given by the defendant's solicitors not to proceed with the action. There is no excuse for the inaction on the part of the plaintiff's solicitors.

[2] The psychological effect caused by the suit hanging over the head of the defendant who is a professional man and quite a well known personality will surely cause or have caused prejudice to the defendant.

[Application of the defendant is allowed and the action is dismissed with costs.]

Cases referred to:

Allen v. Sir Albert McAlphine & Sons Ltd. [1968] 2 QB 229 Birkett v. James [1978] AC 297
Bremer Vulkan v. South India Shipping [1981] 2 All ER 141
Department of Transport v. Chris Smaller (Transport) Ltd. [1989] 2 WLR 578
Vasudevan v. T. Damodaran & Anor. [1981] CLJ (Rep) 101
Toh Hock Thye & Ors. v. Toh Chwee Biow [1982] 1 MLJ 152
Banca Popolare Di Novara v. John Livanos & Sons Ltd. [1973] 117 SJ 509

Reggentin v. Beecholme Bakeries Ltd. [1967] 2 QB 276
Biss v. Lambeth Health Authority [1978] 2 All ER
Department of Transport v. Chris Smaller (Transport) Ltd. [1989] 2 WLR 578
Biss v. Lambeth, Southwark and Lewisham Area Health Authority (Teaching) [1978] 1 WLR 382
Tolley v. Morris [1979] 1 WLR 592
Dexton v. Allsopp [1971] 1 WLR 1310

Legislation referred to:
Rules of the High Court 1980, O. 3 r. 6, O. 34 rr. 2, 2(2)

For the plaintiff - R.R. Chelliah with Mahendran; M/s. R.R. Chelliah Brothers
For the defendant - Karpal Singh; M/s. Karpal Singh & Co.

JUDGMENT

Lim Beng Choon J:

An application was made by the defendant in this case to dismiss this action for want of prosecution pursuant to O. 34 r. 2 of the Rules of the High Court 1980 ('the RHC'). The application was made on 9 February 1989 by the way of summons-in-chambers (encl. 12).

It is useful at the outset to give a summary of the events leading to the filing of the application by the defendant. A writ with a concise statement of the nature of the claim was issued by this Court on 1 November 1982. The plaintiff's claim endorsed therein is *inter alia* for damages for libel and slander said to have been contained in a publication printed and published by the defendant and read out by him to a group of persons on 25 October 1982. The defendant filed a memorandum of appearance on 4 November 1982. On 16 November 1982, the plaintiff filed his statement of claim. The defendant likewise filed his statement of defence on 30 November 1982. Summons-for-directions was duly filed on 17 January 1983 and it was heard by the Senior Assistant Registrar ('the SAR') on 24 February 1983. The SAR made an order on 8 March 1983 directing that:

(i) the plaintiff should within 14 days file an affidavit of documents and serve a copy thereof on the defendant;

(ii) the defendant should do likewise within the same period;

(iii) there be an inspection of documents within 14 days of the service of the respective affidavits; and

(iv) the action be set down for trial within 60 days from the date thereof.

Both the plaintiff and the defendant filed their respective affidavits of documents on 22 March 1983.

Up to that point of the time both parties had been diligent in carrying out all the interlocutory steps in the proceeding. It was what happened after 25 March 1983 that gave rise to the present complaint of the defendant.

The inspection of documents was supposed to have been carried out on 25 March 1983. However as the Counsel acting for the plaintiff had left for England, the solicitors for the plaintiff therefore wrote to the defendant's firm to ask for a postponement of the inspection stating:

> Our Mr. R.R. Chelliah who is in charge of this matter is away in England at the moment and as soon as he returns we will arrange a date convenient to both parties to inspect documents.

The defendant's firm responded in this way:

> We are agreeable to your request that there be mutual inspection of documents when your Mr. R.R. Chelliah returns from England. Our Mr. Karpal Singh's telephone conversation with your office today refers.

Nothing further was done in the action and on 9 February 1989 the defendant applied to dismiss the action for want of prosecution. Thereafter on 13 February 1989 the plaintiff filed in a notice of intention to proceed under O. 3 r. 6 of the RHC.

It is perhaps convenient in this stage to examine the legal principles relating to the jurisdiction of the Court to dismiss an action for want of prosecution. The RHC contain express provisions empowering the Court to dismiss an action for want of prosecution and O. 34 r. 2(2) is one of such provisions. In addition, however, to these express provisions the Court has an inherent jurisdiction to dismiss an action for want of prosecution.

Now as the Counsel acting for the plaintiff had, in the course of his submission to me cited, a number of English authorities in support of his contention that the application of the defendant be dismissed with costs, I think it is useful to examine the English position as regards to this aspect of the law.

Broadly speaking the same principles have been applied by the English Courts, whether the Court is acting under its express power or under its inherent jurisdiction. The power to dismiss for want of prosecution was sparingly used in England until 1968, when it acquired a new and vigorous life following the decision of the Court of Appeal in three cases which were heard together and are generally referred to by the name of the first i.e. *Allen v. Sir Albert McAlphine & Sons Ltd.* [1968] 2 QB 229. The House of Lords in *Birkett v. James* [1978] AC 297, approving the decision of the Court of Appeal in the trilogy appeals reported in the *Allen* case confirmed the two distinct, though related circumstances, in which an action may be dismissed for want of prosecution namely:

(1) when a party has been guilty of intentional and contumelious default; or

(2) where there has been inordinate and inexcusable delay in the prosecution of the action.

(a) giving rise to a substantial risk that a fair trial would not be possible; **or**

(b) such as is likely to cause or to have caused serious prejudice to the defendant.

These two distinct circumstances have recently been reiterated by the English Courts - see *Bremer Vulkan v. South India Shipping* [1981] 2 All ER 141 and *Department of Transport v. Chris Smaller (Transport) Ltd.* [1989] 2 WLR 578. Although the principle laid down in the *Allen* case is clear, nevertheless, what constitutes 'inordinate and inexcusable delay' and 'serious prejudice to the defendant' is a matter of fact and degree and has been discussed in a number of reported cases.

The principle laid down in the *Allen* case has been applied by our Federal Court in *Vasudevan v. T. Damodaran & Anor.* [1981] CLJ (Rep) 101 and also in *Toh Hock Thye & Ors. v. Toh Chwee Biow* [1982] 1 MLJ 152. I shall revert to these 2 cases later in this judgment.

In the present case the defendant is not alleging that the plaintiff has been guilty of intentional and contumelious default. His complaint turns on the second branch of the principle laid down in the *Allen* case. Now the tests applicable to the case are clear. First was there delay? Clearly there was. Secondly was there inordinate delay? Clearly there was. The cause of action arose on 25 October 1982 and the writ was filed on 1 November 1982. Until the

time came for the inspection of documents, both parties did pursue the various steps in the action expeditiously. The SAR's direction is clear and the inspection of documents should have been done on or about 25 March 1983 and on or about 25 May 1983 the action should have been set down for trial. But up to today nothing has been done. The delay of over six years, is to my mind, certainly inordinate or excessive. Was it, in addition, an inexcusable delay? Again I would say certainly it was. It is said in the plaintiff's affidavit that by agreement the inspection of documents was deferred to a date suitable to both parties and to date the said inspection has not yet been complied with. Moreover due to heavy commitments of both parties it was difficult to find a date suitable to all parties despite numerous attempts made by the plaintiff's solicitors. It was also pointed out to this Court that the defendant was arrested and held under detention under the Internal Security Act from October 1987 until 25 January 1989. It was, among other things, out of courtesy and on account of the fact that the defendant had indicated that he would be handling the matter personally, that the matter was kept in abeyance until his release. The defendant, on the other hand, said in his affidavit that the plaintiff had deliberately not complied with the directive to inspect documents since early 1983. The agreement to postpone inspections was only a temporary arrangement made in 1983 pending the return of the plaintiff's Counsel from England in that year. There was, so said he, never any agreement on his part that compliance with the directive for inspection of documents "be indefinite or be at the whim or fancy of the plaintiff." He contended that at any rate he had brought the matter up with the plaintiff at the sitting of the Dewan Rakyat on 9 July 1987. In his submission to me, the defendant said that although he was under detention from October 1987 to January 1989, his firm was and still is in existence. Yet no attempt had been made by the plaintiff or his legal advisors to contact his firm. Now it has been held that in deciding whether an action should be dismissed for want of prosecution, the Court will look at the conduct of both parties. If the defendant has considerably contributed to the delay, or a *fortiori*, has actually agreed to it, he will seldom obtain the dismissal of the action. Thus in *Banca Popolare Di Novara v. John Livanos & Sons Ltd.* [1973] Vol. 117 SJ 509, it was held by the English Court of Appeal that since the parties had by letter "agreed that the hearing ... should be adjourned generally with leave to restore when both parties are ready", the defendants could not succeed on their application to dismiss the action though the action was left in the doldrums for some 7 years. In his judgment in that case Lord Diplock said:

> The agreement between the parties had not been intended to prevent either party from taking any interlocutory steps necessary for getting ready for trial; there had been a duty on each party to take reasonable steps to get the action ready for hearing. What the agreement had involved was that neither party would apply to have the date of trial restored until both were ready to proceed. If either party wished to proceed, or wished the other to proceed, it was incumbent on him to give the other notice of his readiness. Neither had done so; neither had been ready at any time. The delay was excusable.

It is important to note that in the present case the agreement made on 25 March 1983 between the plaintiff and the defendant is certainly not one that imposed "a duty on each party to take reasonable steps to get the action ready for hearing" much less "to restore the case for the trial when both parties are ready to proceed." At its best the agreement was made by the defendant merely to accomodate the request made by the plaintiff's solicitors to postpone the inspection of documents until the return of his Counsel from England. Surely it cannot be construed as an unconditional approval given to the plaintiff's solicitors not to proceed with the action. There is therefore no excuse for the inaction on the part of the plaintiff's solicitors. In any event it has been said that a defendant may properly take no action at all

to stimulate the plaintiff but may "let sleeping dogs lie" (see Lord Salmon's speech in *Birkett v. James* and his judgment in the *Allen* case). In his submission, the learned Counsel for the plaintiff informed me that quite apart from his trip to England in March 1983 he had to go to Australia for an eye operation from June 1986 to June 1987. However that may be, that still left unexplained the delay in not carrying out the inspection of documents and setting down the case for trial from later part of 1983 to say the early part of 1986 - a delay of some 2½ years. In this respect it is important to bear in mind that there are three stages between cause of action and trial; the first, from cause of action to service of writ; the second, from service of writ to setting down for trial; the third, from setting down to the trial itself. Each of these stages inevitably takes time. A plaintiff's solicitors have no control over the time taken before he is consulted or after the action has been set down for trial. The former depends upon the client; the latter upon the state of the business of the Courts. But what the plaintiff's solicitors can control and avoid is any delay, between being first consulted and setting the action down for trial which is not reasonably necessary for the full preparation of his client's case (see per judgment of Lord Denning in the *Allen* case (*supra*) p. 255). Here the cause of action arose on 25 October 1982 and on 1 November 1982 the writ was filed. Slightly more than two weeks later a comprehensive statement of claim was put in. In instituting the action at such speed it is logical to infer that solicitors must have prepared the case sufficiently well to go the second stage. The inspection of documents could well be completed within one month! Why the long delay? Even accepting that the parties were and still are very busy, I still cannot see any excuse for the delay. (See *Reggentin v. Beecholme Bakeries Ltd.* [1967] 2 QB 276). The fact that the defendant was detained under the ISA is neither here nor there. The plaintiff cannot deny that his solicitors did nothing at all. One more point raised by the Counsel for the plaintiff concerns a case filed in this Court which is said to be similar to the present suit and the defendant is said to be the solicitor of one of the parties in that suit. I cannot see the relevancy in adverting to that case as I have not been advised as to how that case can have a bearing on the present one.

It is of course not enough to dismiss the action merely upon my finding that there has been an inordinate and inexcusable delay in the prosecution of his case. I must ask myself whether the delay has given rise to a substantial risk that a fair trial would not be possible or the delay is such as is likely to cause or to have caused serious prejudice to the defendant. In the present case the defendant, in his submission made to me, contended that he would be relying only on the second limb of the proposition that is to say the delay has seriously prejudiced him. He said that to allow the action to hang over his head for an indefinite period would surely cause prejudice to him as a professional man. It is clear that prejudice is not limited to matters affecting proof such as the disappearance of a witness or documentary evidence. A professional man, may be prejudiced by having an action hanging over his head indefinitely. Thus in *Biss v. Lambeth Health Authority* [1978] 2 All ER Lord Denning said:

> Even a short delay after the writ may in many circumstances be regarded as inordinate and inexcusable, and give a basis for an application to dismiss for want of prosecution. So in the present case the delay of nine months was properly admitted to be inordinate and inexcusable. It is a serious prejudice to the hospital to have the action hanging over its head even for that time. On this simple ground I think this action should be dismissed for want of prosecution.

On this aspect, it is interesting to note that the Counsel for the plaintiff in the case of *Department of Transport v. Chris Smaller (Transport) Ltd.* [1989] 2 WLR 578, contended in the appeal before the House of Lords that the prejudice that entitled a defendant to strike out an action should be limited to proof of prejudice in the conduct of the litigation. In rejecting such a proposition Lord Griffiths said (p. 586):

> This seems to me to be but another way of saying that delay has prevented a fair trial of the action: but in both *Allen v. McAlphine* and *Birkett v. James* reference is made both to the risk that here could not be fair trial of the action and of prejudice to the defendants, which, one would suppose, was intended to mean some prejudice other than the mere inability to have a fair trial. Mr. Law frankly conceded that the weight of authority was against his submission.

In *Biss v. Lambeth, Southwark and Lewisham Area Health Authority (Teaching)* [1978] 1 WLR 382, Lord Denning MR and Geoffrey Lane LJ considered that anxiety suffered by nurses whose professional competence was in question was a sufficient prejudice in that case to justify striking out the action, and they also instanced the prejudice that might be caused to a small business with a huge claim hanging over it, as another example of prejudice that would justify making a striking out order. In *Tolley v. Morris* [1979] 1 WLR 592, 600 Lord Diplock said:

> *Biss's* case was concerned with the nature of the prejudice that must be shown - a matter that it was not necessary to discuss in *Birkett v. James*. I see no reason for disagreeing with the actual decision in *Biss's* case...;

The unreported decisions of the Court of Appeal in *President of India v. John Shaw & Sons (Salford) Ltd.* (unreported), 25 October 1977; Court of Appeal (Civil Division) Transcript No. 383A of 1977, and *Bridgnorth District Council v. Henry Wilcock and Co. Ltd.* (unreported), 19 December 1983; Court of Appeal (Civil Division) Transcript No. 958 of 1983, are further examples of the Court taking business prejudice into account as a ground for striking out, and *Hayness v. Akins* (unreported), 11 October 1983; Court of Appeal (Civil Division) Transcript No. 381 of 1983; is an example of delay hanging over a professional man being taken into account as a ground of prejudice. In the face of this powerful line of authority, I cannot accept Mr. Laws' submissions. These authorities clearly establish that prejudice may be varying kinds and it is not confined to prejudice affecting the actual conduct of the trial. It would be foolish to attempt to define or categorise the type of prejudice justifying striking out an action but there can be no doubt that if the defendants had been able to establish significant damage to their business interest, flowing directly from the culpable delay of 13 months after the issue of the writ, a Judge would have been entitled to regard it as prejudice justifying striking out the action.

The proposition in the *Biss* case is noted by the Federal Court in *Vasudevan v. Damodaran* where Abdoolcader J (as he then was) said:

> We would draw particular attention to the judgment of Lord Denning MR, stating (at p. 389) that prejudice to a defendant by a plaintiff's delay in not limited to the death or disappearance of witnesses or their fading memories or in the loss or destruction of records since there is much prejudice to a defendant in having an action hanging over his head indefinitely, not knowing when it is going to be brought to trial.

The same proposition has been applied in the second Federal Court case which I have mentioned earlier namely *Toh Hock Thye & Ors. v. Toh Chwee Biow*. There Salleh Abas FJ said:

> In our view such delay apart from being inordinate and inexcusable has also resulted in adverse effects on the respondent. The prejudice to him here is not merely confined to the possibilities of not having a fair trial or in the form of failing memory of the witnesses or lack of documents and non-availability of witnesses but also encompassing the psychological effect which the suit had on him or having it hung over his head for the last five years or so, (see *Biss v Lambeth*).
> (*ibid* p. 154).

In the present case the defendant is a professional man - he is a lawyer and quite a well known personality in the profession. Besides he is also a member of the Dewan Rakyat. This action is unlikely to come on for hearing for perhaps another year. So in all the matter complained of in the alleged libel has stood for 8 years. It is well known that very often a person is chary about repeating the same sort of criticism when a writ for libel has been issued because he feels he is running some risk of being proceeded against for libel if not for contempt. This psychological effect caused by this suit hanging over his head for such a long period will surely cause or have caused prejudice to the defendant. Moreover this action has abated since 25 October 1988 under the Limitation Act. Why should this suit be allowed to hang over his head for another year or more?

It is perhaps appropriate to mention the view of Davies LJ in his judgment in *Dexton v. Allsopp* [1971] 1 WLR 1310 at p. 1317:

> ...when there has been a very substantial period of delay, it is nearly always impossible for there not to be some prejudice to the defendant.

On this ground alone this action should be dismissed.

I therefore hold that the application of the defendant is allowed and this action is dismissed with costs.

I must say that this has been a difficult judgment to make. I have great sympathy with many lawyers in the difficulties they have to face in litigation of this kind. But gross inordinate delay of the kind which has occurred in this case is quite inexcusable and ought not to be tolerated. It may well be argued that the Court ought not to strike out a man's action without trial because it meant depriving him of his right to come to the King's Court. To this there is a short answer. The delay of justice is a denial of justice. Lately men have often protested at the law's delay and counted it as a grievous wrong. It is therefore the duty of the Court to put right this wrong.

Also found at [1990] 1 CLJ 79